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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 FRAN DONOVAN, )  
9 )  
10 Plaintiff, ) 2:08-cv-01675-RCJ-RJJ  
11 vs. )  
12 FLAMINGO PALMS VILLAS, LLC et al., ) **ORDER**  
13 Defendants. )  
14 \_\_\_\_\_ )

15 This case arises out of an alleged conspiracy to defraud investors in a condominium  
16 development in Las Vegas. Defendants Stump, Storey, Callahan & Dietrich, P.A.'s and W. Scott  
17 Callahan's (collectively "Stump") Motion for Attorney's Fees and Costs (ECF No. 1264) is  
pending before the Court.

18 **I. FACTS AND PROCEDURAL HISTORY**

19 Plaintiffs are eighty-seven individuals who, from 2005 to 2007, purchased condominium  
20 units in a development called the Palm Villas, Las Vegas Cay Club Condominiums (the  
21 "Development"). Originally, there were 139 Defendants, 121 of whom remained in the Second  
22 Amended Complaint ("SAC") (ECF No. 183). Defendants are individuals and entities who  
23 allegedly defrauded Plaintiffs, or assisted in defrauding Plaintiffs, into purchasing units in the  
24 Development. The Development consists of an approximately 12-acre plot of land on which sit  
25 sixteen three-story apartment buildings, containing a total of 360 rental units. The three

1 apartment buildings occupy 2.64 acres. The remaining 9.44 acres consist of several hundred  
2 parking spaces, swimming pools, and other open land (the “Common Area”).

3 Beginning in 2004, Defendants began promoting and selling the 360 units in the  
4 Development to buyers. Defendants promoted the Development as a “resort community” that  
5 would be developed into a hotel. Initially, and before assuming its current name, the  
6 Development was called the Las Vegas Cay Club Resort & Marina. Defendants allegedly  
7 represented that the Development already boasted numerous valuable amenities, such as large  
8 covered patios, weight rooms, and spas, and that Defendants planned to enhance the  
9 Development with many other amenities, such as a game room, a water park, a restaurant, and  
10 conference facilities. By paying a non-refundable \$5,000 payment, Plaintiffs were allowed to  
11 enter into a Reservation Agreement, which required a \$10,000 non-refundable payment per unit  
12 reserved for purchase. Plaintiffs were later provided with a price list for the units, ranging from  
13 \$199,000 to \$499,900. After Plaintiffs invested, Defendants circulated various brochures and  
14 letters to Plaintiffs, informing Plaintiffs of the status of the Development. These letters and  
15 brochures described or displayed images of the various improvements that were being done to the  
16 Development. Defendants also circulated a map of the Development.

17 Plaintiffs allege that the deeds they received in the purchase of each unit represented that  
18 Plaintiffs had an interest not only in their purchased units, but also in the Common Area, which  
19 included parking spaces, swimming pools, and many other valuable amenities that Defendants  
20 promised to add to the Development. After the deeds were signed, Plaintiffs allege that  
21 Defendants circulated a fifty-seven page declaration stating that Plaintiffs’ interests in the  
22 Development did not in fact include the Common Area, but were limited to their individually  
23 purchased rental units and the area common to their particular buildings. As a result, Plaintiffs’  
24 purchased units did not even include any of the Development’s parking spaces. Plaintiffs  
25 contend that the representations made in the fifty-seven page declaration conflicted with the

1 advertising and other promotional representations made by Defendants, the deeds, and the  
2 appraisals on the units upon which Plaintiffs relied in deciding to invest in the Development.

3 Plaintiffs filed the Complaint on November 26, 2008. (Compl., ECF No. 1). The  
4 operative version of the Complaint is the Third Amended Complaint (“TAC”) (ECF No. 335).  
5 The Court has adjudicated over one-hundred (100) substantive motions in this case. Stump has  
6 moved for fees and costs

7 **II. LEGAL STANDARDS**

8 “Unless a federal statute, these rules, or a court order provides otherwise, costs—other  
9 than attorney’s fees—should be allowed to the prevailing party.” Fed. R. Civ. P. 54(d)(1). Rule  
10 54 does not provide for attorney’s fees directly but governs applications for fees under other  
11 statutes or rules that provide for them. *See* Fed. R. Civ. P. 54(d)(2)(B)(ii). Via the present  
12 motions, Stump seeks fees under both federal and state statutes. First, in securities fraud suits:

13 if judgment shall be rendered against a party litigant, upon the motion of the other  
14 party litigant, such costs may be assessed in favor of such party litigant . . . if the  
15 court believes the suit or the defense to have been without merit, in an amount  
16 sufficient to reimburse him for the reasonable expenses incurred by him, in  
connection with such suit, such costs [including reasonable attorney’s fees] to be  
taxed in the manner usually provided for taxing of costs in the court in which the suit  
was heard.

17 15 U.S.C. § 77k(e). Stump seeks fees under § 77k(e). Second, under state law, a court may  
18 award fees to the prevailing party:

19 [w]ithout regard to the recovery sought, when the court finds that the claim,  
20 counterclaim, cross-claim or third-party complaint or defense of the opposing party  
21 was brought or maintained without reasonable ground or to harass the prevailing  
22 party. The court shall liberally construe the provisions of this paragraph in favor of  
23 awarding attorney’s fees in all appropriate situations. It is the intent of the  
24 Legislature that the court award attorney’s fees pursuant to this paragraph and impose  
sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all  
appropriate situations to punish for and deter frivolous or vexatious claims and  
defenses because such claims and defenses overburden limited judicial resources,  
hinder the timely resolution of meritorious claims and increase the costs of engaging  
in business and providing professional services to the public.

25 Nev. Rev. Stat. § 18.010(2)(b). Stump also seeks fees under section 18.010(2)(b).

1     **III. ANALYSIS**

2         The Court has denied another group of Defendants' previous motion for fees and costs  
3 under both § 77k(e) and section 18.010(2)(b) on the merits. It simultaneously denied Stump's  
4 similar motion because judgment had not yet been formally entered against Stump. The Clerk  
5 has now entered judgment against Stump, and the Court considers the motion.

6         As to the merits of the present motion, Plaintiffs argue that its claims against Stump were  
7 not frivolous or vexatious. The Court has already ruled that Sunvest Defendants, for example,  
8 were not entitled to fees under § 77k(e) as against eighteen Plaintiffs whose claims were  
9 previously dismissed for failure to prosecute:

10         Motion No. 936 is a motion for attorney's fees and costs by the Sunvest  
11 Defendants. They seek fees and costs against eighteen Plaintiffs whose claims were  
12 recently dismissed for failure to prosecute. Plaintiffs had until March 17, 2012 to  
13 respond but have not responded or requested any extension. The Court denies this  
14 motion. Movants base their claim to fees upon 15 U.S.C. § 77k(e), which permits  
15 a court to grant costs, including fees, when a securities fraud claim is brought without  
16 merit. The Ninth Circuit has read the "without merit" language of the statute to  
17 permit fees and costs where the suit "borders on the frivolous or is brought in bad  
18 faith." *W. Fed. Corp. v. Erickson*, 739 F.2d 1439, 1444 (9th Cir. 1984). Movants  
19 argue that the securities claims in this case were frivolous. The court finds that the  
20 securities claims were not frivolous. The Court denied a motion to dismiss the  
21 securities claims in this case after extensive analysis. (See Order 11–20, Dec. 15,  
22 2009, ECF No. 274). Although Plaintiffs failed to respond, the Court in its discretion  
23 denies fees and costs and also denies the motion to file related documents under seal  
24 (ECF No. 1004).

25         (Order 5:5–17, July 9, 2012, ECF No. 1082). For the same reasons, the Court denies fees and  
1         costs to Stump under § 77k(e) and finds that fees and nontaxable costs are not warranted under  
2         NRS section 18.010(2)(b).

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## CONCLUSION

IT IS HEREBY ORDERED that the Motion for Attorney's Fees and Costs (ECF No. 1264) is DENIED.

IT IS SO ORDERED.

Dated this 11th day of March, 2013.

ROBERT C. JONES  
United States District Judge